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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1950.

No. 119.

SCHOOL DISTRICT OF THE BOROUGH OF SHENANDOAH

THE BOROUGH OF SHENANDOAH,
A MUNICIPAL CORPORATION ORGANIZED UNDER THE LAWS OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

CITY OF PHILADELPHIA,
TRUSTEE UNDER THE WILL OF STEPHEN GIRARD, DECEASED,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the Court of Common Pleas No. 2 of Philadelphia County appears at pages 720a to 740a of the record.

The opinion of the Supreme Court of Pennsylvania filed March 19, 1951, is reported in 367 Pa. 180 (Record 746-755).

Jurisdiction.

The petition does not set forth any ruling of the Pennsylvania Supreme Court of a nature such as to bring the case within the statutory provisions conferring jurisdiction on this Court.

The judgment of the Supreme Court of Pennsylvania is based upon non-federal grounds only. No federal question is involved.

The petitioners, in their petition (page 2), assert that the Supreme Court, in its opinion, did not specifically deal with the validity of the Act of May 27, 1921, P. L. 1198 (52 Purdon's Statutes sec. 661), and therefore the affirming of the judgments n. o. v. "necessarily presupposed" the unconstitutionality of said Act upon the authority of the opinion in *Pennsylvania Coal Company v. Mahon,* 260 U. S. 393, 43 S. Ct. 158, 67 L. ed. 322, 28 A. L. R. 1321.

Since the early decision of this Court in *Klinger v. Missouri,* 13 Wall. 257, 263, it has been consistently reiterated that jurisdiction cannot be founded on such a basis. As was aptly said by the late Chief Justice Hughes in *Lynch, et al. v. People of New York, ex rel. Pierson,* 293 U. S. 52, 55 S. C. 16 (1934), cited most recently in *Superior Court of California in and for County of Los Angeles, et al. v. Lillefloren, et al.,* 335 U. S. 906:

> "But jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record.
>
> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was ac-

tually decided or that the judgment as rendered could not have been given without deciding it."

Similarly: *Radio Station WOW v. Johnson,* 326 U. S. 120, 129 (1944).

Applying the principles consistently enunciated by this Court as controlling, in considering the opinion of the Supreme Court of Pennsylvania, it is abundantly clear not only that it does not appear affirmatively from the record that the decision of the constitutionality of the Pennsylvania Statute, the Act of May 27, 1921, P. L. 1198, was necessary to the determination of the cause, but, to the contrary, the decision of the Supreme Court of Pennsylvania was actually decided, and the judgment rendered, without deciding the question of the constitutionality of the Pennsylvania statute. It is plain from the opinion of the Pennsylvania Supreme Court that its decision affirming the judgments of the trial court was based solely on the application of the state law.

Petitioners instituted suits in trespass in the Courts of Common Pleas of Philadelphia County alleging that the damages suffered were occasioned by the removing and "robbing" of pillars of coal by the Morea Coal Company in certain of the seams of coal in Kehley's Run Colliery under a written agreement with the Respondent, wherein and whereby Morea Coal Company had been granted the exclusive license to mine, dig and carry away coal in and from all the beds or seams of coal upon the tracts of land, known as Kehley's Run; and that the Respondent in the exercise of due care was bound to foresee that mining so conducted would cause an extensive subsidence.

As to the validity of Petitioners' claims, the Supreme Court of Pennsylvania, in its opinion, ruled (page 748 of record): "There was no evidence to prove the facts on which each plaintiff based its claim or the negligence thus charged against the defendant."

Suit was not instituted against the alleged tort feasor, Morea Coal Company, the corporate entity in possession of, operating the mine, and in the opinion of the Supreme Court, the owner of the mineral estate. In their averments, however, Petitioners alleged that Morea Coal Company conducted mining operations under the supervision, direction, management and control of the Respondent. As to this contention the Supreme Court ruled (page 752 of record): "The Court below correctly held that there was no evidence to prove the averments in plaintiffs' statements of claim, that the lessee conducted mining operations or robbed pillars under the supervision, direction, management and control of the defendant."

After failing to prove their original allegations, Petitioners were permitted to amend during the trial and charge a new kind of negligence, to the effect that Respondent failed to exercise due care in entering into the "lease" of May 3, 1938, when it knew or should have known that the mine was practically exhausted and the removal of further coal would cause the withdrawal of lateral support and subsidence of Petitioners' property. As to this point the Supreme Court in its opinion (Record 753), in addition to holding the amendments were barred by the Statute of Limitations, ruled that Petitioners' "evidence to support their amendments was inadequate."

In concluding its opinion the Supreme Court of Pennsylvania states explicitly the two grounds upon which the cause was decided (Record 755). 1. Plaintiffs (Petitioners herein) failed to prove the averments in their original statements of claim, namely, that the lessee (vendee) (Morea Coal Company) conducted mining operations and was robbing pillars of coal under the supervision, direction, management and control of the defendant. 2. Petitioners amendments introduced a new cause of action barred by the Statute of Limitations.

That Petitioners' briefs and arguments as to the Act of May 27, 1921, P. L. 1198 were carefully considered by the

Supreme Court and the Act deemed not applicable in these cases is expressly stated by the Court in the concluding lines of its opinion (Record 755). "A number of other important legal questions were raised and vigorously argued by both appellants and appellee. We have considered them all, but deem it unnecessary to discuss them herein."

In view of the clear, precise language of the Supreme Court of Pennsylvania specifically enunciating the basis of its opinion on non-federal grounds, even the "supposition" of Petitioners, the sole basis of this Petition, would appear to be without foundation in fact or reason.

The rule enunciated in *Lynch, et al. v. People of New York, ex rel. Pierson* (*supra*), it is respectfully submitted is, therefore, controlling in this cause.

Question Presented.

There is no federal question presented by the record in this case. The only question of law presented is whether the Supreme Court of Pennsylvania correctly decided this case in accordance with the law of Pennsylvania.

Counter Statement.

Prior to his death, which occurred on December 26, 1831, Stephen Girard became the owner of certain tracts of land in Schuylkill County, Pennsylvania. By his Will (Plaintiffs' Exhibit No. 1—Record 641-674), dated February 16, 1830, probated at Philadelphia December 31, 1831, Girard gave his residuary estate to the City of Philadelphia, in trust for the several charitable uses and trusts therein mentioned, the major one being for the establishment of a college for poor white male orphans. Included in the real estate which came to The City of Philadelphia, as said trustee, were tracts of land in Schuylkill County. The City of Philadelphia, as trustee, administered the entire residuary estate of Girard through the executive and

legislative branches of the municipal government until the Supreme Court, in *Philadelphia v. Fox,* 64 Pa. 169 (1870), declared the Act of June 30, 1869, P. L. 1276 (53 P. S. secs. 6481-6486) constitutional. Since then the said residuary estate of Stephen Girard has been administered by the Board of Directors of City Trusts, created by said Act of 1869, as a department of The City of Philadelphia.

Years after Girard's death coal was discovered in some or all of said Schuylkill County tracts. Included therein was a tract then, or thereafter, known as Kehley's Run. On May 3, 1938, Respondent, the City of Philadelphia, Trustee under the Will of Stephen Girard, deceased, acting by said Board of Directors of City Trusts, denominated "Lessor," entered into a written agreement with the Morea Coal Company, a Pennsylvania corporation, denominated "Lessee," (Plaintiffs' Exhibit No. 2—Record 674a-708a), wherein it granted, subject to the covenants, terms and conditions therein specified, to said Company "the exclusive license to mine, dig and carry away coal in and from all the beds or seams of coal upon the tracts of land" specifically mentioned, known and constituting "Kehley's Run Colliery."

The Morea Coal Company was chartered by the Commonwealth of Pennsylvania. Its responsibility, reliability, solvency, efficiency and honesty at the time it entered into the agreement with the Respondent were not challenged at the trial. Its ownership was not discussed, nor was it material to the action.

After approval of said agreement by the Orphans' Court of Schuylkill County, Defendant's Exhibit No. 1 (Record 709a-719a), the Morea Coal Company entered into possession and continuously carried on its mining operations in said "Kehley's Run Colliery" from May, 1938 until the activity was interrupted on March 4, 1940 by a surface subsidence originating in the eastern portion of the Borough of Shenandoah the effect of which thereafter spread to the Kehley Run mine causing nine days thereafter aban-

donment by the Morea Coal Company of the workings immediately adjacent to the subsided area. The surface subsidence was entirely above the Indian Ridge mine which adjoined Kehley's Run. *There was no surface subsidence over the Kehley's Run mine.*

On February 28, 1946, just a few days short of the six years period fixed by the Statute of Limitations, the Borough of Shenandoah, caused a summons in trespass to issue (C. P. No. 6, March Term 1946, No. 898), as did the School District of the Borough of Shenandoah (C. P. No. 1, March Term 1946, No. 897), against Respondent, The City of Philadelphia, Trustee under the Will of Stephen Girard, deceased. In each Statement of Claim, filed April 9, 1946, it was charged that the aforesaid subsidence, and the damage to plaintiff's property resulting therefrom was due to the removing and "robbing" of pillars in certain of the seams of coal by the Morea Coal Company which, it was alleged, the defendant in the exercise of due care was bound to foresee. No act of negligence was alleged other than that pillars alleged to have supported Respondent's own land surface were being removed. No allegation was made that the subsidence was caused by "the *negligent* (emphasis supplied) withdrawal of lateral support," nor that the method or manner of removal was done otherwise than in a skilful manner. Respondent filed an affidavit of defense in each suit denying (1) that it was the owner of coal; (2) that the mining was conducted under its supervision, direction, management and control, and averring that mining operations were conducted by the lessee, Morea Coal Company.

The cases were consolidated and tried before Hon. Edwin O. Lewis, and jury, beginning October 17, 1949, and terminating on November 1, 1949.

At the trial Petitioners introduced the aforesaid agreement of May 3, 1938, between Morea Coal Company and Respondent (Plaintiffs' Exhibit No. 2—Record 674-708) under the terms of which Respondent did grant unto Morea

Coal Company the exclusive license to mine, dig and carry away coal in and from all the beds or seams of coal upon the tracts of land known as Kehley's Run Colliery for the term of ten years subject to the covenants contained therein, which included, inter alia, the payment of royalty with the proviso, however, that if it be decided, either by agreement of the parties or by arbitration under Article XXI, that the workable coal in the premises had been actually exhausted, then the lease would be at an end, and Appellee entitled to resume possession of the premises. Provision was made that wherever, in the regular course of mining operations, the time arrived for mining and removing coal lying vertically or laterally under any railroad, township or other road located or to be located on the surface of the premises, or under any stream, pipe line, pole line, or other easement, or under any structure upon the surface, and a dispute arose as to its removal, the matter would be referred to the board of arbitrators provided for in the agreement. In the event all the workable coal capable of being mined or shipped under the agreement had been so mined or shipped, then the agreement terminated. Further the agreement provided that in the event Morea should receive notice to remove coal which in its opinion would affect surface support, by filing a written statement with the Respondent setting forth its doubt of its legal right to remove the coal and its reasons therefor, it would not be required to proceed with mining, it would not be required to pay royalty on unmined coal, unless the Respondent in writing agreed to assume all liability for loss or damage to any third party by reason of Morea proceeding with the mining. Upon conclusion of the evidence on behalf of the Petitioners as to Respondent's liability, based on the testimony of three expert witnesses, its counsel moved for non suits, which were refused. The learned Trial Judge, over Respondent's objection, then permitted Petitioners to amend their statements of claim, introducing therein new and different allegations of negligence.

The amendments, inter alia, introduced the factual issues whether the condition of Kehley's Run Colliery, in 1938, at the time of the Morea agreement, was such that any further mining in Kehley's Run mine would be unsafe and that this was known by the Respondent when the lease was entered into. But Petitioners' own witnesses testified that at the time of the agreement over 577,000 tons of coal were recoverable with safety—(Record 322a); that depending on the mining methods employed possibly all the coal in the mine could be safely taken out—(Record 329a); that as to the number of years of good mining remaining, a conservative estimate would be ten years, there being approximately 1,100,000 tons of recoverable marketable coal in the mine—(Record 310a-311a). As to knowledge of the Respondent as to the condition of the mine at the time of the agreement the Petitioners' witness testified that in making a report to Respondent that the mine was rapidly approaching exhaustion he had in mind that it had ten good years of mining remaining—(Record 310a).

Following denials of Respondent's motions for non suits, the only eye witnesses who testified at the trial as to the condition of the two adjacent mines described the prior dangerous condition of Indian Ridge mine pillars (Record 432a, 455a).

These eye witnesses testified that conditions in Kehley's Run mine on and prior to March 4, 1940, were safe and workable (Record 415a, 449a, 475a). These factual witnesses further testified that Morea's employees were in Kehley's Run on March 4, 1940 after the subsidence in Shenandoah occurred and that the subsidence caused earth to be pushed from Indian Ridge mine into Kehley's Run mine so that on March 13, 1940 the men and mules had to be taken out of Kehley's Run (Record 436a, 437a, 455a, 481a).

Upon completion of the testimony the learned Trial Judge refused to affirm Respondent's point for binding instructions, allowing an exception. The jury found for the

Petitioners. Thereafter Respondent filed its motions for judgment n. o. v. and a new trial.

On February 4, 1950, after argument upon Respondent's said motions before their Honors, President Judge James Gay Gordon, Jr., Judges Edwin O. Lewis and Vincent A. Carroll, the motions for judgment were granted, in view of which the motions for new trials, which otherwise would have been granted, were dismissed.

The opinion of the Supreme Court, affirming the entry of judgment n. o. v. by the Court below, was filed on March 19, 1951.

In its opinion the Supreme Court, inter alia, made the following findings:

1. *There was no evidence to prove the facts on which each plaintiff based its claim or the negligence thus charged against this defendant;* (i.e., that from May 3, 1938, the lessee, Morea Coal Company, conducted mining operations in Kehley's Run Colliery *under the supervision,* direction, *management and control of the defendant,* its engineers, servants, agents and employees; that the lessee *under the defendant's supervision, direction and control* was engaged in second mining operations, that is, was "robbing" or removing pillars of coal in the several veins on said property and in consequence of this robbing, *the surface area overlying said veins* was caused to subside and the lateral support of plaintiff's property was removed thereby; and that the defendant was bound, in the exercise of due care, to foresee that the mining so conducted would cause an extensive subsidence) (Record 747-748).

2. The law is long and well settled in Pennsylvania that " 'the grant of a right to mine coal in the lands of the lessor and remove therefrom, although the instrument may be called a lease, is a grant of an interest in the land itself and not a mere license to take the coal'. The transaction . . . constituted a sale of the coal conditioned upon its being removed within the period specified" (Record 750).

3. Neither the vendor nor lessor of a coal mine is responsible in trespass for the negligent mining of his (so-called) lessee which results in damage to the surface (Record 751).

4. The trial court correctly held that there was no evidence to prove the averments in plaintiffs' statements of claim that the lessee conducted mining operations or robbed pillars *under the supervision, direction, management and control of the defendant* (Record 752).

5. The plaintiffs' amendments were barred (as the trial court correctly held in its opinion granting Judgment n. o. v.) by the Statute of Limitations and should not have been allowed (Record 755).

6. These cases (cited in the opinion) control in principle the instant case. It is therefore clear that the trial court was correct in holding that plaintiffs' amendments introduced a new cause of action and having been offered at least nine years after the plaintiffs' cause of action arose, were of course barred by the Statute of Limitations (Record 755).

7. Plaintiffs having failed to prove the averments in their original statement of claim, namely, the lessee (vendee) conducted mining operations and was robbing pillars of coal under the supervision, direction, management and control of the defendant, their cases against this defendant must fail (Record 755).

8. "A number of other important legal questions were raised and vigorously argued by both appellants and appellee. We have considered them all, but deem it unnecessary to discuss them herein" (Record 755).

(Italics throughout the above findings are those of the Pennsylvania Supreme Court.)

On March 27, 1951, petitioners filed with the Supreme Court of Pennsylvania a petition to hold record pending filing of petition for reargument.

On March 29, 1951, the petition to hold the record was granted.

On April 6, 1951, however, the petitioners having failed to petition for reargument, the Supreme Court, Per Curiam, entered this Order: "Remittitur exit and with record sent to: Prothonotary Court of Common Pleas, Philadelphia County" (Record 744).

On June 15, 1951, a Petition for Writ of Certiorari was filed.

Argument.

1. Determination of the constitutionality of the Kohler Act (Act of May 27, 1921, P. L. 1198, 52 P. S. 661) by the Supreme Court of Pennsylvania was unnecessary.

It is a fundamental rule of this Court and the Supreme Court of Pennsylvania that the Court will avoid the decision of constitutional questions which are unnecessary to a determination of the rights of the parties. *Thompson v. Consolidated Gas Corp.*, 300 U. S. 55, 75-76; *Driscoll, et al. v. Edison Light & Power Co.*, 307 U. S. 104, 115 (1939); *Com. to use v. Picard, et al.*, 296 Pa. 120, 124, 145 A. 794; *DeSarro v. Snowdon, et al.*, 157 Pa. Superior Ct. 150, 154 (1945) 42 A. (2) 89.

It is clear from the title of the Act, set out in Appendix A, pages 1a and 2a of the Petition, that the purpose of the Act was to prevent abuses in the anthracite coal industry by imposing sanctions on the *operators* of coal mines. It was never intended to regulate the sale or other disposition of mineral estates. It provides penal remedies and injunctive relief, and not, as in this instance, the recovery of money damages in a trespass suit.

Petitioners, at page 9 of their Petition, cite what they believe to be the controlling section of the Act, stressing that it is the operator, director or general manager, superintendent or other person in charge, or *having supervision over* (emphasis supplied by Petitioners) any anthracite coal mine, who is criminally responsible.

The opinion of the Supreme Court specifically finds as facts that the Respondent was not the owner of the mine (Record 750) not the operator of the mining operation (Record 750-752) and finally that the mining activity, which it is alleged by Petitioners caused the damage, was not done "under the supervision, direction, management and control of the defendant (Respondent)" (Record 752).

Petitioners admit that the opinion of the Supreme Court is predicated upon these findings of facts (page 9 of Petition) but insist that such findings were error. By admitting that the Supreme Court came to the conclusion that Respondent exercised no supervision over the coal operator, Morea Coal Company, Petitioners are compelled to *recognize that* the Court, as is its practice, did not pass on the constitutionality of the Kohler Act which applied only to owners, operators and those exercising supervision.

In insisting that the findings of fact made by the learned Trial Court and affirmed by the Supreme Court as to causation and control (Petition, page 9) were in error, Petitioners are asking this Court to exercise its jurisdiction merely to review a decision of a state court upon questions of fact. Such a prayer is not in conformity with the well established practices of this Court as set forth in *Portland Ry. Co. v. Oregon R. R. Comm.*, 229 U. S. 397 (1913), at 411:

> "Ordinarily, in cases which come before us for review, this Court accepts the facts as found by the state Supreme Court. An examination of the record in this case convinces us that the conclusions reached by the Court do not bring the case within that exceptional class where this court will reexamine the facts found, with a view to ascertaining the conclusions reached (citations omitted). In this case the facts found by the lower court and adopted in the Supreme Court are supported by competent testimony; and this court does not sit to retry issues of fact thus heard and determined by the properly constituted tribunals of the State having jurisdiction of the subject."

And again, as was later said by Mr. Justice Day, in *Miedreich v. Lauenstein*, 232 U. S. 236, 243 (1913):

> "This court has repeatedly held that in cases coming to it from the Supreme Court of a State it accepts

as binding the findings upon issues of fact duly made in that court."

This record demonstrates that the findings of fact were duly made and supported by competent testimony.

2. The Supreme Court of Pennsylvania has not misconstrued an opinion of this Court interpreting the Kohler Act but to the contrary has not been required to construe or even discuss the said Act in this proceeding.

The most recent discussion of the Pennsylvania Supreme Court as to the validity of the Kohler Act is to be found in the dictum in the case of *In re State Highway Route No. 185,* Schuylkill County (Glen Alden Coal Co.), 339 Pa. 149, 14 A. (2d) 76 (1940) where, in construing the provisions of the Act of May 26, 1937, P. L. 891, Chief Justice Drew said (pages 156, 157):

> "In holding an Act of this Commonwealth which attempted to impose liability upon those conducting mining operations of anthracite coal as to cause subsidence, *unconstitutional* (emphasis supplied), Mr. Justice Holmes, in *Penna. Coal Co. v. Mahon,* 260 U. S. 393, 415, said: "The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights within the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right in the first place and refusing to pay for it because the public wanted it very much."

The Respondent in its brief and argument before the Supreme Court of Pennsylvania brought to the attention of the Court the opinion of Chief Justice Drew as to the unconstitutionality of the Kohler Act. Similarly the Petitioners, aided by the Intervenors, focused the attention of

the Court on the importance they attached to the belief that for the purposes of the facts in this case, readily distinguishable from the facts in *Penna. Coal Co. v. Mahon,* the Kohler Act was constitutional. This argument appears in the Brief for Intervenors contained in Appendix B of the Petition, being a copy of the Intervenors' Brief filed in the Supreme Court proceedings.

In view of these briefs and arguments, and the recognition by the Court of the Intervenors, it would appear indisputable that had the Supreme Court of Pennsylvania considered the Kohler Act applicable to the facts in these cases, it would have then passed on the question whether the decision in *Pennsylvania Coal Co. v. Mahon* rendered the Kohler Act totally unconstitutional, as contended by Respondents, or not conclusive when applied to the facts of the instant cases as insisted upon by the Petitioner and Intervenors. That neither the learned trial court nor the Supreme Court discussed the Kohler Act is conclusive that both tribunals found that the facts as proved did not establish a case within the applicable provisions of the Kohler Act. Any doubt as to the accuracy of this conclusion is dispelled by a reading of the opinion of the Supreme Court, wherein, as previously pointed out at length, the Court found that the Petitioners had failed to prove the averments of their Statements of Claim, and that there was a total failure of proof that Respondent exercised supervision, management, direction and control over the mining activities.

3. Finally, the language of the Petition itself sets forth a further reason why the prayer of the Petition should be denied. Nowhere in the Petition is an averment made that in the opinion of the learned trial judge or in the opinion of the Supreme Court of Pennsylvania was a finding made in accordance with the settled laws of Pennsylvania, that the Petitioners established by competent testimony the essential element of causation. To the contrary, the

finding of the trial judge, as to the cause of the Petitioners' damage, was (Record 740a): "There was a complete absence of proof of the allegations contained in the Statements of Claim that the Morea Coal Company's mining operations caused a subsidence of the surface of the Kehley's Run mine of the Girard Estate. The proofs as unfolded were that it was the surface over the Indian Ridge mine that caved in, and there was no adequate evidence that this collapse of the surface over the Indian Ridge mine was caused by a withholding of lateral support in the adjoining property of the defendant. On the contrary, all the factual evidence tends to show that the surface over the Indian Ridge mine subsided, and that, within two or three days thereafter, that subsidence caused earth to be pushed into the Kehley's Run mine, breaking down the barriers between the two mines. All the physical facts negatived the theories advanced by the plaintiffs' experts that the collapse had originated in the Kehley's Run mine and had destroyed the lateral support of the Indian Ridge land." The Supreme Court of Pennsylvania, in reviewing this finding of the trial judge, said "*There was no evidence to prove the facts on which each plaintiff based its claim or the negligence thus charged against this defendant.*" (Italics those of the Supreme Court of Pennsylvania. Record 748.)

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID BERGER,
Counsel for Respondent,

JOSEPH P. GAFFNEY,
Of Counsel.